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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-5547

JERRY JACKSON,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent respectfully submits that it is opposed to the issuance of a Writ of Certiorari in the within cause for the reason that the Ohio Supreme Court has decided the federal questions at issue in accord with the applicable decisions of this Court concerning the voluntariness of a confession and the imposition of the death penalty.

OPINIONS BELOW

The Petition of the Petitioner correctly cites the opinions below (Appendix "B").

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I

Whether the confession of the Defendant after he had been fully advised of his constitutional rights was voluntarily given and admissible at the time of his trial?

II

A. Whether the Ohio death penalty statutes are violative of the Eighth and Fourteenth Amendments to the United States Constitution?

B. Whether the fact that the death penalty is imposed as against one defendant and not a codefendant makes the statutes and procedures violative of the Eighth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 2903.01, 2929.02, 2929.03 and 2929.04 of the Ohio Revised Code and Rule 11 (c) (4) of the Ohio Rules of Criminal Procedure are set forth in Appendix "A" herein.

STATEMENT OF THE CASE

On December 6th, 1974, the Hamilton County, Ohio, Grand Jury returned a two count indictment with a specification as to the first count charging Curtis Palmore and Jerry Jackson with Aggravated Murder and Aggravated Robbery.

The Petitioner, Jerry Jackson, waived trial by jury and this cause was heard by a three judge panel of the Court of Common Pleas for Hamilton County, Ohio. A Motion to Suppress the Appellant's statement to the Cincinnati Police was made and evidence adduced on same prior to the commencement of trial (R 2-75). Said motion was denied (R 75).

Prior to trial and during trial the Petitioner moved the Court to accept a plea of guilty in exchange for a dismissal of the specification (R 102, 106, 338, 390). Each time the tender was rejected by the three-judge panel.

At the conclusion of the evidence the Petitioner was found guilty of both counts of the indictment and the specification to the first count. On September 11, 1975, the three-judge panel found no mitigating circumstances to exist and sentenced the Appellant to death.

The Court of Appeals for the First Appellate District of Ohio affirmed the judgment and sentence of the trial court in their decision of December 13, 1976.

The Supreme Court of Ohio affirmed the judgment of the Court of Appeals of the First Appellate District on June 22, 1977 (See Appendix B).

This matter is now before this Court on the defendant's Petition for Certiorari to this Court.

STATEMENT OF THE FACTS

On November 14, 1974, in the early evening hours Gordon Hawley and Charles Pomerantz, a seventeen year old Elder High School student, were working at the Queensgate Shell Station located at Eighth and Linn Streets in Cincinnati, Hamilton County, Ohio (R 123). Approximately 7:45 P.M. Gordon Hawley left work leaving Charles Pomerantz to operate the gasoline station by himself until the 10:00 P.M. closing time.

Shortly before 8:00 P.M. three of Charles Pomerantz's friends stopped at the Queensgate Shell Station to purchase gasoline before they went to Kentucky. While they were buying the gasoline Ronald Scott heard a young black man ask Charles Pomerantz where the restroom was located. Ronald Scott described that man as being about six feet tall, weighing about 160 pounds, being light complected, and wearing a dark jacket and a ski cap (R 130, 133, 134). Collean O'Connel also saw the black man at the gasoline station and she described him as being about six feet tall and thin (R 137).

At approximately 8:00 P.M. Curtis Palmore, Jerry Jackson and William Mascus were parked in Curtis Palmore's car in the back parking lot adjacent to the Queensgate Shell Station. Armed with a .22 caliber pistol, characterized as a Saturday night special, Curtis Palmore and Jerry Jackson approached the gasoline station. They entered the main lobby of the gasoline station where they engaged Charles Pomerantz in conversation about automobile tires. As Charles Pomerantz was explaining about the tires he was shot in the rear of the head. He gasped, "Oh, my God," and fell to the floor. Curtis Palmore rolled him over and took his wallet and its contents from his back

pocket. Also taken was a cash box containing quarters, dimes and nickels and Charles Pomerantz's money changer.

Palmore and Jackson returned to the car whereupon they drove to Mt. Adams where they had a pizza and some hoagie sandwiches and beer. Charles Pomerantz died as a result of the gunshot wound on November 17, 1974, never having regained consciousness.

Four days after the shooting, Palmore, Jackson and Mascus were apprehended in Covington, Kentucky, when they attempted another armed robbery. On November 19, 1974, Detectives Frank Sefton and Ernest Thompson from the Cincinnati Police Department's Homicide Squad, went to Covington to interview Mascus, Palmore and Jackson. First they talked to William Mascus. After approximately thirty minutes of interviewing they tape recorded a twenty minute statement. Next they interviewed Curtis Palmore. The interview lasted approximately thirty-five minutes and then they taped a statement which took about twenty-five minutes. During that statement Palmore indicated that Jerry Jackson was the gunman in the Pomerantz homicide.

After lunch at approximately 1:00 P.M. on November 19, 1974 they interviewed Jerry Jackson. At the outset they fully advised him of his constitutional rights (R 50). After about thirty minutes of conversation Jerry Jackson executed a waiver of rights form and consented to give a tape recorded statement. They informed Jackson that they had already talked to Mascus and Palmore (R 42). They also informed him that the police had witnesses that had seen a person at the Queensgate Shell Station that they believed was a suspect in the murder (R 43). They also told Jackson that Palmore had named him as the triggerman and that he had gotten the cash box. At first Jackson doubted that Palmore had said that he, Jackson, was the triggerman so the detectives played a portion of Palmore's

statement for Jackson. At all times throughout the interview and taped statement Jerry Jackson acknowledged that he knew what his rights were and that no threats or promises had been made to him (R 52, 53, 54). Jackson then gave a taped statement indicating his involvement in the murder-robbery and named Palmore as the gunman.

A joint statement was made by Mascus, Palmore and Jackson that same afternoon recounting what happened at the Queensgate Shell Station on November 14, 1974. In addition the deposition of William Mascus given on May 16, 1975, indicated the involvement of not only Jackson and Palmore but of Mascus himself.

Based on all the evidence the three-judge court found the Petitioner guilty as charged.

ARGUMENT

I

WHETHER THE CONFESSION OF THE PETITIONER; AFTER HE HAD BEEN FULLY ADVISED OF HIS CONSTITUTIONAL RIGHTS AND WAS PRESENTED WITH SOME OF THE EVIDENCE AGAINST HIM, WAS VOLUNTARILY GIVEN AND ADMISSIBLE AT THE TIME OF HIS TRIAL.

We respectfully submit that the totality of all of the evidence submitted at the time of the Motion to Suppress clearly reflects that the statement of the Petitioner was voluntarily given after he had been warned of all of his constitutional rights. The fact that the police advise a defendant of what evidence they have against him includ-

ing the statements of his codefendants does not make an otherwise voluntary statement, involuntary.

The facts submitted to the trial court reflected that on November 19, 1974, Petitioner made two tape-recorded statements. One was a statement made by himself. The other was a joint statement with Curtis Palmore and William Mascus.

It is respectfully submitted that the totality of the circumstances surrounding the statements given by the Petitioner to the police will reflect that they were voluntarily and knowingly made.

Prior to talking with the Petitioner, Detective Sefton fully advised him of his constitutional rights which are commonly referred to as "Miranda" rights (R 51). After thirty minutes of conversation with the detectives the Petitioner executed a standard waiver of rights form (R 51). That form also contained the pertinent constitutional rights (Defendant's Exhibit "A") At the outset of the solo taped statement the Petitioner again was fully advised of his constitutional rights (R 51). At each instance the Petitioner stated he understood what his rights were. Again at the outset of the joint statement all three suspects, Palmore, Jackson and Mascus, were advised of their constitutional rights (R 52).

Petitioner sought to have his statements suppressed on the ground that they were not voluntarily given. Prior to talking with the Petitioner, Detectives Sefton and Thompson had interviewed William Mascus and Curtis Palmore. Both suspects had given the police taped statements. Curtis Palmore named the Petitioner as the gunman in the Pomerantz homicide. When told this information the Petitioner was disbelieving at first. Once the detectives played a portion of the taped Palmore statement the Petitioner was no longer in doubt as to Palmore's statement.

In the Petitioner's words he gave the police a statement "because I knew I wasn't guilty, or nothing" (R 12). The Petitioner said he wanted to tell the police his side of the story because Curtis Palmore was lying (R 21-22). That is why the Petitioner confessed. He did not confess because he was threatened, coerced or cajoled. Furthermore, the Petitioner was not promised anything (R 54-55).

In *State* v. *Black*, 48 Ohio St. 2d 262 (1976) the Ohio Supreme Court held that the Defendant's statement was voluntary where the Defendant was permitted to contact an alleged accomplice who told the Defendant he would tell the police the truth. Even though it was this statement that triggered the Defendant's decision to talk; the court did not find that the Defendant's statement was the result of improper inquisitorial proceedings. Likewise, in the present case, the Petitioner's decision to talk was not the result of any improper procedures, but rather was the result of Petitioner's desire to express his side of the story.

Other confessions have been held admissible where the Defendant has confessed in the face of the evidence accumulated against him. In *Michigan* v. *Mosley*, 423 U.S. 96 (1975) the Defendant was arrested in connection with two robberies. He was advised of his *Miranda* rights, and expressed a desire not to talk. Several hours later another officer advised the Defendant of his *Miranda* rights and proceeded to ask questions concerning a homicide case. At first the Defendant denied involvement. After the officer told him that an Anthony Smith had confessed to participating in the killing and had named the Defendant as the gunman, the Defendant waived his *Miranda* rights and made a statement implicating himself. The circumstances of the confession in this case are similar as will be discussed below.

Three other cases that involve confessions which were given once the accused was presented with the evidence against him are, *United States* v. *Hodge*, 487 F. 2d 945 (5th Cir. 1973) (evidence explained); *United States* v. *Davis*, 527 F. 2d 1110 (9th Cir. 1975) (bank surveillance photograph shown accused); and *United States* v. *Pheaster*, 544 F. 2d 353 (9th Cir. 1976) (presentation of evidence against accused). In none of these cases did the Court conclude that the confession was coerced.

Petitioner claims his statement should have been suppressed because he did not voluntarily waive his constitutional rights. Petitioner has previously asserted that he was psychologically coerced into making a statement by the devious methods employed by the police.

An examination of those alleged "devious" methods is merited at this point. The police told the Petitioner that they had talked to William Mascus and Curtis Palmore. That was the truth. The police told the Petitioner about items of identification belonging to Charles Pomerantz which had been turned over to the police by Richard Palmore, Curtis Palmore's father. They did in fact have those items of identification. The detectives told the Petitioner that Palmore had named him as the gunman. Palmore had in fact named the Petitioner as the gunman as the Petitioner positively knew once he heard that portion of Palmore's statement. The police also informed the Petitioner that they had two witnesses that could identify a suspect. Ronald Scott, Collean O. Connell and Greg Liss had been at the Queensgate Shell Station minutes prior to the senseless murder. Two of them had observed a black man at the gasoline station when they were there. The only thing the police did not know was how strong the identification would be. But again the police told the Petitioner the truth.

So it seems the alleged devious method the police employed was to frankly apprise the Petitioner of all the facts as they knew them. Then they asked him if he wanted to tell his side of the story. Petitioner did just that. He did it freely, knowingly and intelligently.

Petitioner had been advised of his rights several times. He voluntarily waived his right to remain silent. The Court properly overruled the Motion to Suppress. There is nothing to remotely suggest that the behavior of the police officers was of such a nature so as to overbear the Petitioner's will to resist to answering questions asked of him, *Rogers* v. *Richmond*, 365 U.S. 534 (1961). The record is also devoid of any evidence that indicates the Petitioner misapprehended his constitutional rights, *State* v. *Jones*, 37 Ohio St. 2d 21 (1974) and *State* v. *Parker*, 44 Ohio St. 2d 172 (1975).

Even if the Court finds that there might have been deception employed which is factually incorrect and which Respondent specifically denies, it is submitted that deception alone does not make a confession inadmissible as a matter of law, *State* v. *Braun*, 509 P 2d 742, 745 (Wash. Sup. Ct. 1973); 99 ALR 2d 772 (1965).

Confessions have been admissible where: the suspect was falsely told that his polygraph examination showed gross deceptive patterns, *State* v. *Keiper*, 493 P. 2d 750 (Ore. App. 1972); the suspect was falsely told that a co-suspect had named him as the triggerman, *Commonwealth* v. *Baity*, 237 A. 2d 192 (Pa. 1968); and the police concealed the fact that the victim had died, *People* v. *Smith*, 108 Ill. App. 2d 172, 246 N.E. 2d 689 (1969).

The cases cited by Petitioner are not applicable to the present case. In *People* v. *Fioritta*, 441 P. 2d 625 (Cal. Sup. Ct. 1968) the suspect was advised of his rights and then *refused* to execute a waiver. Immediately thereafter

the suspect was confronted face-to-face by his co-suspects whose confessions had implicated the suspect in the process. The suspect was then re-advised of his rights and confessed. Here the Petitioner executed a waiver of rights. There was no indication, as there was in *Fioritta,* that he intended to assert his rights.

Petitioner's assertion that the State has an obligation to bring every witness who had contact with him before the Court at the Motion to Suppress hearing is unfounded. In *State* v. *Edwards,* 49 Ohio St. 2d 31 (1976) the Ohio Supreme Court stated, "A party is not required to use every prospective witness it may have. Once the prosecution has established its case, it may rest at the point it chooses," 49 Ohio St. 2d at 44. Likewise, once the State had met its burden in the motion to suppress hearing, it may rest at that point if it so choses. Petitioner could have subpoenaed the other officers to testify at the motion to suppress if he thought they would help support his position. He chose not to.

In *State* v. *Davis,* 438 P. 2d 185 (Wash. Sup. Ct. 1968) the Court discussed the missing witness rule as it applied to a case where there was a genuine dispute as to whether there was a waiver. Here there is no such dispute. Petitioner clearly waived his rights as the notification of rights form plainly exhibits.

Accordingly, it is respectfully submitted that the trial court properly overruled Petitioner's Motion to Suppress his statements. The statement was voluntarily given after the Petitioner had been advised several times of his *Miranda* rights and had been confronted with the evidence against him.

II

A

WHETHER THE OHIO DEATH PENALTY STATUTES ARE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

B

WHETHER THE FACT THAT THE DEATH PENALTY IS IMPOSED AS AGAINST ONE DEFENDANT AND NOT A CO-DEFENDANT MAKES THE STATUTES AND PROCEDURES VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

We submit that the second question presented by petitioner to this Court was not fully presented to the lower Courts in Ohio. The lengthy question as propounded by the petitioner contains several questions. We have broken the lengthy question of the petitioner into two separate parts.

A

WHETHER THE OHIO DEATH PENALTY STATUTES ARE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

We submit that in order to fully understand and comprehend the reasons we believe the Ohio death penalty statutes to be constitutional, one must look to the history of the

statutes and death penalty and the interpretations given that statute by the Courts.

In 1972 this Court in the case of *Furman* v. *Georgia,* 408 U.S. 238 (1972), declared that the death penalty statutes in the various states were unconstitutional. There were many varied opinions rendered in that case with certain justices indicating that the death penalty under all circumstances was unconstitutional and others indicating that under the appropriate circumstances the death penalty was constitutional. Between these two general lines of reason a third line of thought appeared in which the justices appeared to indicate that they believed that there was too much uncontrolled discretion without any guidelines in the implementation of that discretion so that the death penalty was being imposed in an arbitrary, capricious and standardless manner which resulted in a wanton and freakish imposition of said penalty.

Two general lines of thought then arose as to interpreting this Court's decision in the *Furman* case (ibid).

The first line of thinking was to make the death penalty mandatory upon the showing of certain types of crime without any discretion in the imposition of the sentence. This line of reasoning was subsequently determined not to be appropriate as reflected in this Court's opinion in *Woodson* v. *North Carolina,* 428 U.S. 280 (1976).

The second line of thinking was that the death penalty itself was not unconstitutional provided there was even-handed justice and there were guidelines to insure that it would not be inflicted in an arbitrary and capricious manner.

The legislature of Ohio followed this second line of interpretation when they enacted the new criminal code and the included death penalty statutes in response to this Court's decision in the *Furman* case (ibid).

In Ohio not every murder brings on the death penalty. It is only in certain specific types of cases that the death penalty may be imposed.[1]

Not only is the death penalty limited to the certain specific type of cases but it is also required that the state specifically set forth the aggravated circumstance in the indictment and prove it beyond a reasonable doubt.[2]

Therefore the legislature has clearly set forth certain specific definable standards in limiting the type of cases (murder cases) in which this penalty can be imposed.

If this were all that was before the Court and if the legislature had left out the mitigating circumstances; then

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[1] "Ohio Revised Code 2929.04 Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment . . . . and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or certain specific office holders specifically enumerated.

(2) The offense was committed for hire.

(3) The offense was for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing or attempt to kill another committed prior to the offense at bar, or the offense at bar was a part of a course of conduct involving the purposeful killing or attempt to kill two or more persons by the offender.

(6) The victim was a law enforcement officer whom the offender knew to be such and either the victim was engaged in his duties at the time or it was the offenders purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit or fleeing after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery or aggravated burglary."

[2] Ohio Revised Code 2929.04(A).

the Ohio statute would be unconstitutional under the majority opinion in *Woodson* v. *North Carolina,* 428 U.S. 280 (1976).

As indicated, Ohio has two parts to its hearing in death penalty cases; the first being the trial and proof of the defendant's guilt; and, the second being the mitigation hearing.

Rather than leave the matter to the unbridled discretion of the trial court judge, and to assure the even handed administration of justice in the imposition of this penalty, the Ohio legislature set forth specific guidelines for the trial judges to follow at a mitigation hearing, thus assuring the uniform implementation of the sentence.[3]

The Supreme Court of Ohio, in interpreting the new Ohio death penalty statute, determined that the Ohio mitigating factors were similar to these approved by this Court in *Proffitt* v. *Florida,* 428 U.S. 242 (1976).[4]

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[3] Ohio Revised Code 2929.04(B)

"Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed but the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offenders psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

[4] "The mitigating factors, as with any legislation may require judicial interpretation and clarification, but they are basically reasonable and similar to these approved in *Proffitt* v. *Florida,* supra. (49 L. Ed. 2d 913) and they do clearly guide the sentencing judge or judges in their decision." *State* v. *Bayless,* 48 O.S. 2d 73 (1976) at page 86.

They also indicated that they would review each case to assure the uniform and fair imposition of the death penalty by trial judges.[5]

The Ohio Supreme Court went on to state that they would "allow the broadest consideration of mitigating circumstances consistent with their language."[6]

The Court also stated that the mitigating circumstances must be liberally construed in favor of the accused.[7]

The Supreme Court of Ohio went on to determine that the age of the defendant and his prior record were relevant factors to consider at the mitigation hearing.[8]

Thus it can be seen that the Ohio statute in its two step procedure affords to the defendant all of the guarantees to specifically limit the type of cases in which the death penalty is imposed and to place guidelines on the mitigation hearing to assure its evenhanded fairness in a uniform manner throughout the state.

We further submit that a defendant who has received the death penalty has an absolute right of appeal both to the Court of Appeals and to the Supreme Court of Ohio which reviews each case on an individual basis to assure that the death penalty is not imposed in a wanton or freakish manner.

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[5] "We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio trial judges." *State* v. *Bayless*, 48 O.S. (2d) 73 (1976) at page 86.

[6] *State* v. *Bayless*, 48 O.S. (2d) 73 (1976) at page 86.

[7] "This language must be strictly construed against the state and liberally construed in favor of the accused R.C. 2901.04(A)." *State* v. *Woods*, 48 O.S. (2d) 127 (1976) at page 134 and 135.

[8] *State* v. *Bell*, 48 O.S. (2d) 270 (1976) at page 280; Appendix page 141.

We therefore submit that the Ohio statute is constitutional.

B

WHETHER THE FACT THAT THE DEATH PENALTY IS IMPOSED AS AGAINST ONE DEFENDANT AND NOT A CO-DEFENDANT MAKES THE STATUTES AND PROCEDURES VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

We think that perhaps some background in this case might be appropriate in so far as the second part of this question is concerned. The prosecution and defense of the petitioner in this case was somewhat unique.

The thrust of the defense was not that the petitioner was not guilty or that he was guilty of a lesser included offense. Rather the thrust was that the petitioner Jerry Jackson should receive the same punishment that his co-defendant, Curtis Palmore, had received, that is, life imprisonment. To this end the Defendant-Appellant tendered a conditional plea of guilty throughout the trial. Repeatedly the three-judge panel rejected that tender. Much of the defense effort was dedicated to proving one fact – that Curtis Palmore, not the petitioner Jerry Jackson, was the triggerman.

It is to be noted that the State appealed the dismissal of the specification by the trial Court in the Palmore case and the Court of Appeals of the First Appellate District of Ohio found for the State and determined that the trial Court had improperly dismissed the Aggravating Specification. The Court of Appeals reversed the dismissal of the

specification and remanded the matter back to the trial Court for further proceedings as provided by law.

The Supreme Court of Ohio refused review of the matter and it went back to the trial court. The trial Court thereupon refused to follow the mandate of its upper Appellate Court and once again dismissed the aggravating specifications as to the co-defendant Palmore. The State of Ohio immediately sought leave to appeal the judgment of the second panel in the Palmore case and that case is currently pending appeal in the Court of Appeals of the First Appellate District.

The co-defendant William Mascus was found guilty as charged but he was sentenced to a life sentence after the Court determined that a mitigating factor existed. His case is currently on appeal to the Ohio Appellate Courts.

The above facts are detailed only in so far as they explain the facts of the co-defendants cases.

Regardless of the status of the co-defendant's case the issue to be determined is whether or not the death sentence was arbitrarily imposed in this case. It is submitted that it was not. The petitioner was proven guilty beyond a reasonable doubt of committing Aggravated Murder and Aggravated Robbery. In addition the State of Ohio proved the specification relative to the Aggravated Murder count beyond a reasonable doubt. A full mitigation hearing was conducted. The reports of the psychiatrists and the probation department were considered along with the evidence presented. The evidence presented failed to establish by a preponderance any of the mitigating circumstances as set forth in Section 2929.04 (B), Ohio Revised Code.

The Ohio Supreme Court has held the Ohio's statutory scheme which imposes the death penalty is clearly constitutional, *State* v. *Bayless,* 48 Ohio St. 2d 73 (1976).

It is submitted that where the procedures set forth by statute are scrupulously adhered to and where the evidence sustains the conviction a defendant is not arbitrarily sentenced to death. As the Ohio Supreme Court observed in *State* v. *Osborne,* 49 Ohio St. 2d 135, 146 (1976), "The Ohio Statutes require the death sentence to be imposed upon all defendants convicted of aggravated murder coupled with at least one of the seven aggravating circumstances, provided that none of the three mitigating factors exist. All similarly situated defendants are thus sentenced alike." The fact that co-defendants are not similarly sentenced does not constitute a violation of the equal protection clause of the Fourteenth Amendment.

Interestingly enough three of the five cases decided by this Court, viz., *Gregg* v. *Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 2923 (1976); *Woodson* v. *North Carolina,* 428 U.S. 280, 96 S. Ct. 2978 (1976); and *Roberts* v. *Louisiana,* 428 U.S. 325, 96 S. Ct. 3001 (1976) involved petitioners with co-defendants who had not received death penalty sentences. Although the issue of denial of equal protection was not directly decided, the Court did have some observations to make relative to plea bargaining procedures in capital cases that Respondent feels are supportive of the position that the Petitioner was not denied his rights under the Eighth and Fourteenth Amendments as alleged.

Mr. Justice Stewart, writing for the Court in *Gregg* v. *Georgia,* supra, did not meet the issue of plea bargaining headon but did state that the death penalty may be imposed so long as (1) The punishment must not involve the unnecessary and wanton infliction of pain and (2) the punishment must not be grossly out of proportion of the severity of the crime.

The mode of execution in Ohio, electrocution, has been

upheld in the past as not involving the unnecessary and wanton infliction of pain, see: *In re Kemmler,* 136 U.S. 436 (1890) and *Louisiana ex rel. Francis* v. *Resweber,* 329 U.S. 459 (1947).

As in *Gregg* v. *Georgia,* decided by this Court, this Court is concerned here only with the imposition of capital punishment for the crime of murder. It is respectfully submitted that when a life is deliberately taken, as it was in this case, it cannot be said that the punishment is invaribly disproportionate to the crime, *Gregg* v. *Georgia,* supra, 96 S. Ct. at 2932.

In discussing the area of prosecutorial discretion Mr. Justice Stewart states, "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution," *Gregg* v. *Georgia,* supra, 96 S. Ct. at 2937. However, the procedures utilized in granting such mercy must conform to the law.

Perhaps the strongest language to support Appellee's position comes from the dissenting opinion of Mr. Justice White in *Roberts* v. *Louisiana,* supra, 96 S. Ct. at 3014, where he observes:

> "I have much the same reaction to plea bargaining and executive clemency. A prosecutor may seek or accept pleas to lesser offenses where he is not confident of his first-degree murder case, but this is merely the proper exercise of the prosecutor's discretion as I have already discussed. So too, as illustrated by this case and the North Carolina case, *Woodson* v. *North Carolina,* ante, some defendants who otherwise would have been tried for first-degree murder, convicted and sentenced to death are permitted to plead to lesser offenses because they are willing to testify against their co-defendants. This is a grisly trade, but it is not irrational, for it is aimed at insuring the successful conclusion of a first-degree murder case against one

> or more other defendants. Whatever else the practice may be, it is neither inexplicable, freakish nor violative of the Eighth Amendment. Nor has it been condemned by this Court under other provisions of the Constitution. *Santobello* v. *New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *Parker* v. *North Carolina*, 397 U.S. 790, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970); *Brady* v. *United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). See also *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30-31, 93 S. Ct. 1977, 1984, 36 L. Ed. 2d 714 (1973)."

So according to Mr. Justice White, the mere fact that Curtis Palmore was originally sentenced to life imprisonment and Jerry Jackson was sentenced to death does not make either sentence inexplicable, freakish nor violative of the Eighth Amendment.

Plea bargaining and grants of immunity are often the only method available to bring capital offenders before the bar of justice. As an example, it is doubtful that the People of California would have been able to successfully prosecute Charles Manson but for the testimony of a witness who was granted immunity. The Respondent does not assert that a plea bargain or immunity was warranted in the case at bar but merely that the fact it does exist does not make the Ohio statutory scheme for imposition of the death penalty constitutional.

Each defendant stands as an individual before the bar. The fact that his criminal confederates may or have received life imprisonment as a sentence has no bearing on whether his sentence is constitutional.

As was asserted in the above the Ohio statutory scheme is clearly constitutional. The recent pronouncements in *Gregg* v. *Georgia*, supra; *Jurek* v. *Texas*, 428 U.S. 262, 96

S. Ct. 2950 (1976); and *Proffitt* v. *Florida*, 428 U.S. 242, 96 S. Ct. 2960 (1976) make this conclusion even more inescapable.

There is no provision in the Revised Code or the Ohio Rules of Criminal Procedure which require the court to accept a conditional plea of guilty and dismiss a specification in a capital case when such a plea is tendered. The trial court, therefore, properly overruled Appellant's motion to dismiss the specification to the indictment.

As the Ohio Supreme Court held in this case (*State* v. *Jackson*, 50 O.S. 2d 253) at page 258:

> "Neither the United States Supreme Court nor this Court has held plea bargaining with a defendant in exchange for the defendants testimony unconstitutional. We find no constitutional duty upon the state to accept guilty pleas in exchange for more lenient sentencing, even if an accomplice already has plea bargained successfully for the lighter sentence. As a practical matter, it is questionable whether the prosecutions plea bargaining position relative to subsequently tried accomplices might not be seriously eroded if the state were bound to acquiese in gentler sentences in exchange for guilty pleas of all subsequently tried accomplices, once the first plea bargain had been reached."

We further submit that an acceptance of what the petitioner has attempted to do in this case would clearly make the statute and the Rule unconstitutional. Petitioner is endeavoring to say that anyone who says I plead guilty can thus avoid the death penalty; but, anyone who refuses to plead guilty must face the death penalty.

This clearly would not pass constitutional muster. Each case is an individual one with individual rights and circumstances.

We therefore submit that because the petitioner; who was identified as the triggerman was not permitted to plead guilty conditional on the dropping the Aggravating Specifications; and who refused to plead guilty without such condition; does not violate his constitutional rights.

Petitioner has apparently read other briefs to this Court and has incorporated a substantial portion of his argument on matters which he never previously raised in the lower courts in Ohio; and in fact, has not even raised them in his questions presented to this Court.

In light of the fact that this surplusage is not even reflected in his questions presented to this Court; we have not responded to these extraneous arguments.

CONCLUSION

In conclusion we respectfully submit that there were no violations of the petitioners rights under the United States Constitution in so far as his confession was concerned. It was his voluntary statement given to the police after he had been advised of his constitutional rights and after he had been presented with some of the evidence against him.

We further submit that there is no conflict between Ohio Revised Code Sections 2929.02 through 2929.04 and Ohio Criminal Rule 11 (C) (3). To accept petitioners theory that anyone could escape the death sentence just by pleading guilty would clearly make Ohio's scheme unconstitutional.

It is to be noted that at no time has the defendant ever denied his guilt or that he was entitled to mitigation as such. The only thing that the petitioner argues is that because one co-defendant; who was alleged to have been an accomplice but not the triggerman, and who offered to

turn states evidence against the petitioner was permitted to plead guilty and subsequently escape the death penalty that he should also have the right to plead guilty but conditional on escaping the death penalty.

We therefore submit that this Court should deny jurisdiction and deny the Petition for Certiorari.

Respectfully submitted,

SIMON L. LEIS, JR.
Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

WILLIAM P. WHALEN, JR.
Assistant Prosecuting Attorney

JOSEPH L. EMMRICH
Assistant Prosecuting Attorney

Of Counsel:
ROBERT R. HASTINGS, JR.
Former Assistant Prosecuting Attorney

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§ 2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2929.02 Penalties for murder

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

§ 2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which

may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three

judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

PERTINENT PORTIONS OF UNITED STATES CONSTITUTION

A. THE FIFTH AMENDMENT

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

B. THE EIGHTH AMENDMENT

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

C. THE FOURTEENTH AMENDMENT

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CRIMINAL RULE 11 PLEAS, RIGHTS UPON PLEA

* * *

(C) Pleas of guilty and no contest in felony cases

* * *

(4) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

* * *

APPENDIX B

OPINIONS OF COURTS BELOW

THE STATE OF OHIO,

Appellee,

v.

JACKSON,

Appellant.

[Cite as State v. Jackson (1977), 50 Ohio St. 2d 253.]

(No. 77-147—Decided June 22, 1977.)

APPEAL from the Court of Appeals for Hamilton County.

According to a statement given by appellant to Cincinnati police (tape recorded and entered into evidence at trial below), appellant Jerry Jackson and Curtis Palmore, at approximately 7:45 p. m. on November 14, 1974, approached the service station where Charles Pomerantz was working. Appellant and Palmore intended to rob the attendant at the station. While appellant deliberately diverted the attention of Pomerantz from Palmore, to facilitate the robbery, Palmore shot Pomerantz. Palmore then removed Pomerantz's wallet from his pocket, and when the two left the scene they took the wallet and the service station money box with them.

Palmore's father testified that on November 18, 1974, he found a library card and a driver's license, both bearing the name of Charles Pomerantz, among his son's personal effects. He turned the items over to Cincinnati police officers, and testified at trial that on the evening of November 14, 1974, appellant and Palmore had conversed in the

latter's house, and that the two had departed the house together before 8:00 p. m.

Cincinnati detective Frank Sefton testified that appellant's statement of November 19, 1974, was taken while appellant was in custody, and that Sefton already had told appellant that the police had two witnesses to the Pomerantz crime who could identify a suspect. Sefton testified that he already had played appellant a recording in which Curtis Palmore named appellant as Pomerantz's killer. Sefton also had told appellant that Curtis had named appellant as the party who had taken the service station cash box.

On December 6, 1974, the Hamilton County Grand Jury returned a two count indictment, with a specification as to the first count, jointly charging appellant and Palmore with aggravated murder and aggravated robbery. Appellant waived his right to trial by jury and a three judge panel found him guilty as charged. On September 11, 1975, the panel unanimously found that none of the mitigating circumstances in R.C. 2929.04 (B) had been established by a preponderance of the evidence, and sentenced him to a term of from seven to twenty-five years for his aggravated robbery offense, and to death for his aggravated murder offense. On December 13, 1976, the Court of Appeals for Hamilton County affirmed appellant's conviction.

The cause is now before this court as a matter of right, pursuant to Section 2 (B) 2 (a) (ii) of Article IV of the Constitution of Ohio.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Robert R. Hastings, Jr.* and *Mr. William P. Whalen, Jr.*, for appellee.

Mr. Albert J. Mestemaker and *Mr. Donald G. Montfort*, for appellant.

I.

Per Curiam. Appellant contends that the trial court erred in denying his motion to suppress the statement obtained from him by police on November 19, 1974. The question herein is not whether the interrogating officers properly advised him of his constitutional rights, but whether they ignored those rights after advising appellant of them.

Appellant submits that where a police officer, in an incustodial setting, tells a homicide suspect that all other possible accomplices already have confessed and implicated the suspect, and plays a recording to prove this, informs the accused that two witnesses can identify him, and shows the suspect evidence removed from the decedent which identifies the suspect, that in that event the officer has so manipulated the suspect as to overcome him by improper influence and a form of coercion. We disagree.

Appellant relies heavily upon *People* v. *Fioritto* (1968), 68 Cal.2d 714, 441 P.2d 625. In that case, the sole issue was the admissibility of the confession of a criminal defendant; central thereto was whether his confession was admissible if elicited after the defendant initially had refused to waive his constitutional rights. The Supreme Court of California determined that, under the facts of that case and pursuant to the explicit directives of *Miranda* v. *Arizona* (1966), 384 U.S. 436, the confession was inadmissible.[1]

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[1] Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or

Although the Supreme Court of California discerned no alternative to holding the *Fioritto* confession inadmissible, it pointedly continued: "In so holding, we prohibit only continued questioning after an individual has *once* asserted his constitutional rights. We do not, of course, disapprove of the use of statements, whether admissions or confessions, voluntarily initiated by a suspect. Such statements had been repeatedly sanctioned in the decisions of this court * * * and are also expressly authorized in the *Miranda* opinion." *Id.*, at page 719.

The case at bar sharply contrasts with *Fioritto*. Appellant did not initially assert any constitutional right and the record shows that his confession was voluntarily initiated by him.

The instant case is less a parallel to *Fioritto* than to *State* v. *Black* (1976), 48 Ohio St.2d 262, 358 N.E.2d 551. In *Black*, a homicide defendant's confession "resulted from the defendant's independent decision to speak after being confronted at his own request by those of his friends and associates who were aware of his involvement in the crimes and by his father whom he possibly wished to warn of his impending confession and to whom he asserted that the homicide was accidental rather than purposeful. The statements made to him by * * * [an alleged accomplice] that he was going to 'tell the truth' triggered his decision to speak rather than inquisitorial proceedings. The circumstances show no 'over-zealous police' * * * no hostile atmosphere. The statements which resulted merely confirmed persuasive and compelling evidence of guilt." *Black*, *supra*, at page 266.

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otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." *Miranda* v. *Arizona* (1966), 384 U. S. 436, 473-74.

As this court held in the fourth paragraph of the syllabus in *Black*:

"Where the warnings mandated by *Miranda* • • • have been given and fully honored, a confession which results from the defendant's independent decision to speak is voluntary although it was made to police officers, while in custody, and in answer to an examination conducted by them."[2] This proposition of law is overruled.

II.

Appellant avers further that it is incumbent upon the state to produce as a witness any law enforcement officer who in any fashion participated in an interrogation resulting in a confession which the state presents as evidence, and that when a confession challenged as involuntary is sought to be used at trial against a criminal defendant, the defendant is entitled to a reliable and clear-cut determination that his confession was voluntarily rendered.

The case relied upon by appeliant on this point is *State* v. *Davis* (1968), 73 Wash. 2d 271, 438 P. 2d 185. Therein, the defendant argued that because he denied the state's version of his alleged admissions, and because a witness included on the list of prosecution witnesses was neither called by the prosecution nor his absence explained, the trial court erred in refusing to instruct the jury on the missing witness rule, *i. e.*, that the failure of the state to

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[2] "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. • • • Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda* v. *Arizona*, *supra*, at page 478.

produce this witness to verify the defendant's waiver of his constitutional rights raised an inference that this prospective witness' testimony would have been unfavorable to the state. *Davis* stated that when the missing witness rule is applicable, the jury should be instructed that it may draw an unfavorable inference against the party failing to call the missing witness, if the jury believes such inference warranted under all the circumstances. *Id.*, at page 281. However, the inference is permissive.

The failure to bring a witness before the court when either party claims that the facts would thereby be elucidated usually gives rise to an inference that the failing party fears to bring the witness forth. This fear suggests that the witness would have exposed facts unfavorable to the failing party.[3] But as this court has held relative to Crim. R. 16 (B) (4)[4]: "A party is not required to use every prospective witness it may have. Once the prosecution has established its case, it may rest at the point it chooses." *State* v. *Edwards* (1976), 49 Ohio St. 2d 31, 44, 358 N. E. 2d 1051. The missing witness rule applies to inferences, and the weight to be accorded the inference is a matter for the trial court and not a basis for reversal if, as in the instant case,

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[3] "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. * * * [T]he propriety of such an inference in general is not doubted." 2 Wigmore on Evidence (3 Ed.), 162, Section 285 (1940).

[4] Crim. R. 16(B) (4) provides:

"The fact that a witness' name is on a list furnished under subsections (B)(1)(b) and (f), and that such witness is not called shall not be commented upon at the trial."

there is evidence from which that court could find the challenged statement voluntary. This proposition of law is overruled.

III.

Appellant contends finally that R. C. 2929.02 (providing penalties for murder), R. C. 2929.03 (providing for the imposition of sentence for capital offenses), and R. C. 2929.04 (providing criteria for imposing death or imprisonment for capital offenses), are violative of the Eighth and Fourteenth Amendments to the United States Constitution. Appellant argues that his sentence pursuant thereto was arbitrarily, wantonly, and freakishly imposed, this being inconsistent with the requirements outlined in *Furman* v. *Georgia* (1972), 408 U. S. 238.

In the instant case, none of the mitigating circumstances listed in R. C. 2929.04 (B) was established by preponderance of the evidence. However, appellant asserts that since his accomplice, Palmore, enjoyed the dismissal of the specification from his indictment and received the sentence of life imprisonment for murder,[5] appellant's motion to allow him to plead guilty to the murder charge, contingent upon dismissal of the specification and the imposition of a life sentence, should also have been granted. Because appellant's gambit was not accepted, and Palmore's apparently was, appellant proposes that his death sentence was arbitrary.

Neither the United States Supreme Court nor this court has held plea-bargaining with a defendant in exchange for

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[5] Palmore entered a guilty plea to the murder count and the trial court found him willing to testify at the behest of the state.

the defendant's testimony unconstitutional. We find no constitutional duty upon the state to accept guilty pleas in exchange for more lenient sentencing, even if an accomplice already has plea-bargained successfully for the lighter sentence. As a practical matter, it is questionable whether the prosecution's plea-bargaining position relative to subsequently-tried accomplices might not be seriously eroded, if the state were bound to acquiesce in gentler sentences in exchange for the guilty pleas of all subsequently-tried accomplices, once the first plea-bargain had been reached.

There is no requirement under *Furman* for the state more lightly to punish defendants insisting upon guilty pleas. "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* v. *Georgia* (1976), 428 U. S. 153, 189. Denial of a plea-bargain to a defendant indicted for a capital offense is not at all arbitrary or capricious; it is consistent with statutes and rules of court directing the prosecution and punishment of criminals.[6]

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[6] For example, Crim. R. 11(C)(3) provides, in relevant part:

"With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

"If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

"If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentences accordingly, in the interests of justice."

Our examination of the record in the instant case confirms that the sentencing authority focused on the particular circumstances of this appellant and his crime. This proposition of law is overruled and the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CELEBREZZE, W. BROWN, P. BROWN, SWEENEY and LOCHER, JJ., concur.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-75231

STATE OF OHIO,
Plaintiff-Appellant,

vs.

CURTIS PALMORE,
Defendant-Appellee.

DECISION
(Filed December 13, 1976)

No. C-75519

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JERRY JACKSON,
Defendant-Appellant.

DECISION
(Filed December 13, 1976)

PER CURIAM.

These causes came on to be heard upon the appeals, the transcripts of the docket and journal entries, the original papers and pleadings from the Court of Common Pleas of Hamilton County, the transcripts of the proceedings, the assignments of error, the briefs and the arguments of counsel.

On December 6, 1974, the Hamilton County, Ohio Grand Jury returned a two count indictment with a specification as to the first count charging the appellants, Curtis Palmore and Jerry Jackson, with aggravated murder and aggravated robbery. The charges against Palmore and Jackson were disposed of in separate proceedings, but their appeals are so interrelated that we have elected to consider them jointly.

At about 8:00 P.M., November 14, 1974, a seventeen year old youth, Charles Pomerantz, was working as the sole attendant in a gasoline service station in an inner city area of Cincinnati. At the same time Palmore, Jackson and a third man, William Mascus, were seated in a car belonging to Palmore which was parked in a lot adjacent to the service station. Essentially, it is unquestioned that Palmore and Jackson entered the station and conversed with Charles Pomerantz about tires. During the course of the discussion, Charles Pomerantz was shot in the back of his head with a .22 caliber pistol and died without regaining consciousness three days later as a consequence of the wound.

Police investigation established that Pomerantz's wallet had been taken from him. Additionally, the money changer which he had carried and the cash box in the station with its contents consisting of rolls of coins were also missing.

On November 18, 1974, Palmore, Jackson and Mascus were arrested in Kentucky in connection with another alleged armed robbery. After the authorities in Kentucky advised Cincinnati police of those arrests, detectives from Cincinnati interrogated all three men. Palmore admitted that he participated in the robbery of the service station but indicated that Jackson had shot Charles Pomerantz. Jackson stated that he and Palmore had committed the robbery but denied that he had done the shooting.

Also, on November 18, 1974, the father of Palmore had found a shoe box in a closet of the residence he shared with his son and had examined its contents. The elder Palmore had found a number of cards and documents bearing the name of Charles Pomerantz. Because he had read of the death of Pomerantz, ultimately he summoned police officers who took the materials.

The trial of Palmore on the indictments was set for April 21, 1975. On that date at the outset of the proceedings, this colloquy occurred:

"JUDGE BETTMAN: Mr. Davis, I believe you have an oral motion to present?

MR. DAVIS: Your Honor, as I indicated to your Bailiff, before we begin with the Jury selection, on behalf of the defendant, there is an oral motion we would like to make, which will be reduced to writing later. In this time situation, as such, we are requesting to make this motion orally.

The motion is simply this, Your Honor, that at this time we are making a pre-trial motion on behalf of the defendant Curtis Palmore, to dismiss the specification, one of aggravation as contained in the indictment in this particular matter. If that motion would be granted, the defendant

would withdraw his plea of not guilty as previously entered, and would tender an acceptance on that plea and tender to the Court a plea of guilty to Counts One and Two of the indictment.

The motion is being made pursuant to Rule 11 of the Ohio Rules of Criminal Procedure, and more particularly, subparagraph C-4, and paragraphs 1 and 3 of that subparagraph."[1]

The prosecuting attorney objected to the suggested procedure, urging that any plea of guilty should be tendered and accepted without reservation. That protest, however, was rejected and Palmore, through counsel, entered a plea of guilty to the first (aggravated murder) and second (aggravated robbery) counts of the indictment.

After further discussion, the court embarked upon a personal interrogation of Palmore to determine whether he understood the significance of his plea and its consequences. Here, the prosecutor requested that he be admonished that "the death penalty is a potential penalty by virtue of his plea . . . ." To this the court responded by stating:

"JUDGE BETTMAN: Well, the Court has stated in open Court that on the acceptance of the plea, provided by the rules, the Court will then, under the rules, dismiss the specification. If the Courts, and some Appellate Courts feel the Court does not have authority to do that, I think it would obviously negate the whole proceeding and have to start over."

This utterance prompted the prosecutor to restate his

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[1] Rule 11(C)(4) is now numbered Rule 11(C)(3) and is so referred to in the body of this decision.

objection, which evoked the following, from one of defense counsel:

"MR. GAINES: May we respond? One of the paramount conditions of tendering a plea is this defendant understanding that the death penalty will not be imposed, and that the Court dismiss the specification. That is the underlying basis of this plea."

Ultimately, the court sentenced Palmore "to be confined in the Ohio Penitentiary for the balance of (his) life" on the first count of the indictment, and for a term of 7 to 25 years on the second, the terms to "run concurrently." Then, without more, the court ordered that the specification, in the interest of justice and in harmony with its earlier declarations, be dismissed.

On May 19, 1975, Jackson's trial commenced before a panel of three judges of the Court of Common Pleas of Hamilton County. Some weeks before, Jackson had moved the panel to dismiss the specification of aggravated circumstances and to proceed in his case in the manner adopted by the trial judge in Palmore's case. The panel overuled that motion. On the day of trial Jackson again offered in writing to tender a plea of guilty to both counts of the indictment on the condition that the panel dismiss the specification of aggravated circumstances and sentence him as Palmore had been sentenced. The written offer was coupled with an appropriate separate motion and, ultimately, both applications were denied.

The cause then proceeded to trial with the State of Ohio offering evidence in support of its accusations against the defendant-appellant. At the conclusion of the State's case in chief, among other exhibits offered and accepted, the trial court received into evidence on behalf of the defen-

dant-appellant a transcript of the proceedings had before Judge Bettman in the case of Curtis Palmore.

Thereafter, the State having rested its case, the court heard and denied a motion for judgment of acquittal and also heard again and denied again defendant-appellant's motion to be permitted to enter a plea of guilty to the indictment in exchange for dismissal of the specification of aggravated circumstances and a sentence of life imprisonment as to Count One as had been done in the case of Palmore.

At the conclusion of the defendant's case in chief, no rebuttal testimony being offered by the State, the defendant-appellant once again offered to plead guilty to the indictment, provided the trial court would dismiss the specification of aggravated circumstances and sentence him to life imprisonment. This motion was again denied by the trial court.

After argument the three judge trial panel found the defendant-appellant guilty of aggravated murder and aggravated robbery, with the specification of aggravated circumstances. The court thereupon ordered a presentence examination and psychiatric evaluation as prescribed by Ohio Revised Code Section 2929.03 (D).

On September 11, 1975, the trial court sentenced the defendant-appellant, Jackson, to death for the offense of aggravated murder and to serve a term of seven to twenty-five years for the offense of aggravated robbery.

With respect to the within appeal numbered C-75231, (Palmore), the State of Ohio sought and was granted leave to appeal and has assigned the following four errors:

> 1. The trial court erred when it entered into plea negotiations with defense counsel over the objections of the prosecutor.

2. The trial court erred when it agreed to dismiss the specifications in said indictment prior to the plea of guilty being entered and over the objection of the prosecutor.

3. The trial court erred when it exercised the executive function of the prosecutor in negotiating a plea of guilty to the charge of aggravated murder conditioned upon the fact that the specifications would be dismissed; all without the consent or concurrence; and in fact the objection of, the prosecutor.

4. The trial court erred in dismissing the specifications prior to the plea of guilty and without evidence being offered.

The appellant, Jackson, asserts two assignments of error, the first of which is:

The trial court erred to the prejudice of defendant-appellant in denying defendant-appellant's motion to suppress the statements obtained from him by officers of the Cincinnati Police Division on November 19, 1974.

His second assignment of error, together with the issue he urges as presented for review makes apparent the propriety of our consideration of these appeals simultaneously. The assignment is given as:

The trial court committed prejudicial error in overruling motions to dismiss the specifications to the first count of the indictment in that Sections 2929.02, 2929.03 and 2929.04, Ohio Revised Code, are unconstitutional and violate the Eighth and Fourteenth Amendments to the Constitution of the United States of America.

The issue as submitted is:

The acceptance of a plea by the court under Ohio law to aggravated murder with the condition that the

> specification of aggravated circumstances will be dismissed, thus sparing one accused from the death penalty, violates a co-defendant's rights to equal protection of the laws when another court in the same jurisdiction and in the same case refuses to accept his plea with the same condition and the same protection being afforded denied to him.

In support of its assignments of error *in toto*, the State in Palmore urges that before a judge can dismiss a specification in an indictment charging aggravated murder the accused must enter an unqualified plea of guilty. Secondarily, the prosecutor argues that a judge may not "on his own" enter into plea bargaining with counsel for the accused where the State objects.

Rule 11 (C) (3), Ohio Rules of Civil Procedure, provides in pertinent part:

> "(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any . . . .
>
> . . . .
>
> If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice."

From this the prosecutor concludes that the court below did not have "jurisdiction" to dismiss the specification until Palmore's plea of guilty had been made and received.

We view the extraordinary procedure adopted by the court in its disposition of the charges and specification presented against Palmore as raising the issue of discriminatory application of the death penalty.

This Court has decided in a line of cases beginning with *State* v. *Reaves,* No. C-75022 (1st Dist. January 26, 1976, unreported) and *State* v. *Woods,* No. C-75047 (1st Dist. January 26, 1976, unreported), both affirmed by the Ohio Supreme Court at 48 Ohio St. 2d 127 (1976), and including *State* v. *Bell,* No. C-75068 (1st Dist. April 12, 1976, unreported), and *State* v. *Hall,* C-75171 (1st Dist. April 12, 1976, unreported), that: (a) the Ohio statutes imposing the death penalty do not permit arbitrary, discriminatory, and freakish application thereof and thus meet constitutional muster under *Furman* v. *Georgia,* 408 U.S. 238 (1972); and (b) that those same statutes do not impose cruel and unusual punishment contrary to the Federal and State Constitutions.

The Ohio Supreme Court has more recently reached the same conclusion in *State* v. *Bayless* (1976), 48 Ohio St. 2d 73.

The peculiar issue presented in the appeal in Palmore's case, however, is one not previously considered by this Court. To us there appears the distinct possibility that if the foregoing Rule 11 (C) (3) is construed to bear the weight the trial court placed on it, the distinct specter of arbitrary and even freakish application of capital punishment then arises to haunt the Ohio procedure. We are confirmed in our concern with this aspect of Palmore's case as a result of the care taken by the Ohio Supreme Court in *State* v. *Bayless, supra,* at p. 84, to restate the principle enunciated by the United States Supreme Court in *Gregg* v. *Georgia* (1976), 49 L. Ed. 2d 859, 887, that:

> " 'In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is give adequate information and guidance. As

> a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.' "

Here, the State of Ohio had from the outset objected to the dismissal of the specification; no negotiated plea bargain accompanied the dismissal. Rather, it is manifest that the trial judge unilaterally decided the question of whether to allow Palmore to live or die, predicating his authority to do so on Rule 11 (C) (3), that is, upon his decision, arrived at in the manner discussed below, that to dismiss the specification would serve the "interests of justice."

Thus, before addressing himself to the specifics of his reasons, the trial court stated:

> "If I believe that on the basis of everything that I have learned in the courtroom, or through the Prosecutor or Defense, if I believed that this defendant, Palmore, was the man who shot Pomerantz, I would not accept his plea. The policy of the State is on record, and I would not think it appropriate."

The court then continued with the reasons why he had concluded, in advance of trial, that Palmore was not the man who shot Pomerantz:

> "However, to confirm or to elaborate and deepen my understanding of what the State's case was here, over the weekend I took the liberty of talking to Officer Sefton, of the Homicide Squad, who along with his partner, Officer Thompson, was in charge of the investigation and development of this case, and examined this defendant and the co-defendant, and Mascus, the other man who was picked up in Covington, along with them. It was Officer Sefton's judgment, in which he said his partner concurred, that they do not think,

> of course, no one was there, and there can be no certainty in this matter, but in their opinion, this defendant was not the man who shot Pomerantz."

The justifications for the dismissal, summarized, are: (1) Palmore did not kill Charles Pomerantz; (2) Palmore exhibited a willingness to testify against others if the State desired to call him; (3) that a guilty plea would avoid a lengthy trial and subsequent appeals of uncertain result and afford a certain conclusion, and (4) that the constitutionality of the Ohio capital punishment statute was in question.

While we deem it unnecessary to comment upon the above reasons advanced by the court for its decision, we note again that none of these conclusions were reached by a process in which the prosecutor participated, consented, or to which he agreed, an observation prompted by our recognition that plea bargaining, while not without its shortcomings and dangers, is a recognized device serving a respectable and necessary purpose, and one which has been held to be outside the orbit of arbitrariness and capriciousness struck down by *Furman*. See, *Gregg* v. *Georgia*, 49 L. Ed. 2d 859, 889 (1976), (opinion by Stewart, J., Powell and Stevens, J.J., concurring); Id at 903 (opinion by White, J., the Chief Justice, and Rehnquist, J., concurring). Certainly, one of the eventualities contemplated by Rule 11 (C) (3) was the dismissal by the court of a specification, and the subsequent imposition of sentence, where such procedure has been suggested to the court as the result of the striking of a plea bargain between the State and the defendant. Another eventuality contemplated by Rule 11 (C) (3) might well be the dismissal of a specification which, for one reason or another, is deficient *as a matter of law*. In both instances (which we do not neces-

sarily insist are exclusive), the dismissal of the specification serves the "interests of justice" without at the same time providing an opportunity for the exercise of the kind of discretion which may work an arbitrary or capricious result in the treatment accorded different defendants in an otherwise similar posture.

Without laboring the matter further, we conclude that Crim. R. (11) (C) (3) must be construed to preclude the kind of action taken by the trial court in the Palmore case, and its use limited to those instances, as above, where the action in dismissing the specification is subject to ascertainable, predictable, and definable parameters which avoid by such definition the possibility of the results found, for instance, in comparing the disposition of Palmore with the disposition of Jackson. Only in such construction is it possible to avoid, in our judgment, the constitutional deficiencies held fatal in *Furman* v. *Georgia, supra.*

The several assignments of error asserted by the State have raised, directly in the second assignment and obliquely in the others, the issue to which we have addressed ourselves immediately above. We believe that, so considered, they are well taken and hold that the judgment in case number C-75231 (Palmore) must be reversed, set aside, and held for naught, and the cause is ordered remanded to the Court of Common Pleas of Hamilton County for further proceedings according to law and not inconsistent with this decision.

With respect to the appeal perfected by Jackson our conclusion is otherwise.

In his initial assignment, Jackson contends that the court erred in failing to suppress statements obtained from him by police officers. Our examination of the transcript of

the proceedings convinces us that before Jackson was questioned he was fully and effectively advised of his constitutional rights and, indeed, ultimately signed a written waiver of those rights.

Apparently recognizing the impediment such evidence places in their path, counsel for Jackson submit in argument that the issue is not whether the interrogators failed to give the "Miranda" warning but whether Jackson's rights were, in fact, ignored. A comparison of all the evidence germane to the question of the admissibility of Jackson's inculpatory statement leads us to conclude that it was voluntarily given and that his protests that he was the victim of improper influence sufficient to overcome his will to resist interrogation are not supported in the record. The first assignment of error then is not well taken.

Jackson's second assignment of error raises the question whether Sections 2929.02-03-04, Revised Code, are constitutional. The Ohio Supreme Court, as already noted, addressed itself to that same issue in deciding *State* v. *Bayless, supra,* and declared in its initial syllabus that:

> "Ohio's statutory framework for the imposition of capital punishment, as adopted effective January 2, 1974, is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment to the United States Constitution."

Resultantly, we find the second assignment not to be well taken on authority of *State* v. *Bayless, supra.*

As a corollary to his second assignment of error, Jackson advances, as a constitutional impediment to the judgment rendered against him, the disparity in the treatment of the two men, himself and Palmore, otherwise legally and inseparably yoked in the commission of the robbery and

murder. Two comments need to be made about this argument. First, in view of the action of this Court today in the Palmore appeal, such disparity ot treatment – the constitutional effect of which we have hereinbefore examined – disappears, at least at the level brought to us in the Palmore appeal. As a result of further proceedings in the Palmore case, as directed herein, there may or may not be a disparity in the result finally obtained in the Palmore trial from that affirmed in the Jackson trial.

If there is a disparity in such final results, then a second comment becomes appropriate in answer to appellant Jackson's argument. Assuming, as we must, that subsequent proceedings in Palmore's case will be conducted pursuant to law and in accordance with the Ohio statutes now determined to be constitutional enactments, the fact that a different result may then be reached in the judgment accorded Palmore will not, in and of itself, cast a cloud on the judgment theretofore rendered against Jackson. There is no constitutional requirement that separate judgments against coconspirators, where otherwise regular, must be equal and exact. *State* v. *Durham,* No. C-74595 (1st Dist. September 29, 1975, unreported).

It may well be determined, at the proper time and under the appropriate circumstances, that factual and/or legal reasons exist for reaching a result different in the one case than the other; it is the merest speculation to attempt to predict at this time whether such reasons may be sufficient in law. It is enough for now that this possibility does not raise a constitutional issue which Jackson can properly raise.

Having found no merit in the assignments of error in Case No. C-75519 (Jackson), nor any other error apparent

from the record, the judgment of the Court of Common Pleas of Hamilton County therein must be and is affirmed.

SHANNON, P. J., PALMER and KEEFE, J.J.

PLEASE NOTE:

The Court has placed of record its own entry in these cases on the date of the release of this Decision.